NO. 12-15-00105-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

CONSOLIDATED PROPERTY INTERESTS, LLC, APPELLANT	***§***	***APPEAL FROM THE 273RD***
	§	***JUDICIAL DISTRICT COURT***
V.		
PENNY PAYNE, APPELLEE	***§***	***SABINE COUNTY, TEXAS***

MEMORANDUM OPINION

Consolidated Properties Interests, LLC appeals the trial court's declaratory judgment awarding a one-half mineral interest to Penny Payne. In two issues, Consolidated argues that the trial court erred in its construction of a 1931 mineral deed and that it is entitled to attorney's fees. We reverse and render in part and remand in part.

BACKGROUND

J.O. Payne and Pearl Leak were married in 1905. In 1907, J.O. purchased the subject property, from W. A. Polley.[1] During their marriage, J.O. and Pearl had two children—Frances Payne and James Payne, Jr. Pearl died intestate in 1909.[2]

J.O. married Gertrude Moss in 1915. During their marriage, they had several children, including a son, Jerry Payne. In 1916, J.O. deeded his one-half interest in the subject property to

[1] Prior to his marriage to Pearl, J.O. sold this property to Polley.

[2] Under the law in effect at the time of Pearl's death, her children inherited her community property interest in the subject property. *See* Act of March 17, 1955, 54th Leg., R.S., ch. 55, § 45, 1955 Tex. Gen. Laws 88, 103, *amended by* Act of May 24, 1991, 72nd Leg., R.S., ch. 895, § 4, 1991 Tex. Gen. Laws 3062, 3064, *amended by* Act of May 28, 1993, 73nd Leg., R.S., ch. 846, § 33, 1993 Tex. Gen. Laws 3337, 3351 *amended by* Act 1993, 73rd Leg., R.S., ch. 846, § 33, sec. 45(b), 1993 Tex. Gen. Laws 3337, 3351, (H.B. 1200) (current version at TEX. ESTATES CODE ANN. § 201.003 (West 2014)).

Gertrude. On February 12, 1931, J.O. and Gertrude entered into a ten year mineral lease with Sun Oil Company that covered the subject property.[3] On March 12, 1931, J.O. and Gertrude signed a mineral deed conveying Gertrude's one-half mineral interest in the property to Frances and James, Jr.[4]

The 1931 mineral deed states, in pertinent part, as follows:

MINERAL DEED)
)
J.O. PAYNE & WIFE,) filed for record April 1st, 1931, at 11 o'clock A.M.
TO)
JAMES O. PAYNE JR. AND)
FRANCES CASEY.)

The State of Texas)
)
County of Sabine)

Know all men by these presents; that we, J.O. Payne, and wife Gertrude Payne, of San Augustine County, Texas, for and in consideration of the sum of One Dollars, ($1.00) cash in hand paid by James O. Payne, Jr., and Frances Casey, wife of J. K. Casey, hereinafter called grantees, the receipt of which is hereby acknowledged, have granted, sold, conveyed, assigned and delivered and by these presents do grant, sell, convey, assign, and deliver unto the said grantees, an undivided ½ interest in and to all of the oil, gas and other minerals in and under, and that may be produced from the following described land, situated in Sabine County, Texas, to-wit:

. . . .

Said land being now under an oil and gas lease, executed in favor of the Sun Company, it is understood and agreed that this sale is made subject to the terms of said lease, but covers and includes one-half of all of the oil royalty, and gas rental or royalty, due and to be paid under the terms of said lease, insofar as it covers the above-described property.

It is understood and agreed that one-half of the money rentals which may be paid to extend the terms within which a well may be begun under the terms of said lease is to be paid to the said grantees, and in event that the above-described lease for any reason becomes canceled or forfeited, then and in that event an undivided one-half of the lease interest and all future rentals on said land for oil, gas and all other mineral privileges shall be owned by said grantees, they owning one-half of oil, gas and other minerals in and under said lands, together with one-half interest in all future rents.

To have and to hold the above described property, together with all and singular the rights and appurtenances thereto in anywise belonging unto the said grantees herein, their heirs, and assigns forever; and we do hereby bind ours heirs, executors and administrators to warrant and forever defend, all and singular the said property unto the said grantees, herein their heirs, and

[3] At that time, a married woman's conveyance of Texas real property was invalid if her husband did not join in the conveyance. *See* ***Little v. Linder***, 651 S.W.2d 895, 900 (Tex. App.–Tyler 1983, writ ref'd. n.r.e.).

[4] This deed is recorded in Volume 34, Page 613 of the Deed Records of Sabine County, Texas.

assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof.

Witness our hands this the 12th day of March, 1931.

J.O. Payne
Gertrude Payne

In its capacity as a purported successor in interest to a portion of Frances's mineral interest, Consolidated filed the instant suit against Jerry Payne and his wife, Penny,[5] seeking a declaration that the subject property was the community property of J.O. and Pearl Payne. Penny filed a counterclaim and a cross claim against Consolidated contending that the subject property in the 1907 deed was J.O.'s separate property. She further sought a declaration from the court that she, as Gertrude's successor, was the owner of the one-half mineral interest described in the 1931 mineral deed.[6]

Following a bench trial, the trial court rendered a judgment declaring that J.O. Payne and Gertrude Payne owned one-half of the minerals described in the 1931 mineral deed following their delivery of the deed to Frances and James, Jr. The trial court further declared that this one-half mineral interest is now owned by Penny Payne. This appeal followed.

DEED CONSTRUCTION

In its first issue, Consolidated argues that the trial court erred in determining the mineral ownership in the subject property. Therefore, Consolidated contends it is entitled to a declaration that following the execution and filing of the 1931 mineral deed, Frances and James, Jr. owned one hundred percent of the mineral rights in the property.

Standard of Review and Applicable Law

The threshold legal question in interpreting a deed is whether the instrument is ambiguous. *See* ***Victory Energy Corp. v. Oz Gas Corp***. 461 S.W.3d 159, 172 (Tex. App.–El Paso 2014, pet. denied). Here, neither party contends that the 1931 mineral deed is ambiguous, and we agree that it is not. Thus, we construe the mineral deed as a matter of law. *See* ***Luckel v.***

[5] Following Jerry's death on August 22, 2013, Penny became the independent executrix of his estate. It is apparent from the trial court's judgment that Penny was the sole beneficiary under Jerry's will.

[6] In her counterclaim and cross action, Penny named Edna Beatrice Casey, Debra Lynn Casey Berry, Christopher Eric Casey, and Rachelle W. Casey as cross defendants in addition to Consolidated. Because only Consolidated is a party to this appeal, we do not discuss the interests of the other cross defendants.

White, 819 S.W.2d 459, 461 (Tex. 1991). In doing so, we review the trial court's construction of the deed de novo. *See* ***Hausser v. Cuellar***, 345 SW.3d 462, 467 (Tex. App.–San Antonio 2011, pet. denied). When conducting a de novo review, we exercise our own judgment and redetermine each issue while according no deference to the trial court's decision. *See* ***id***.

Our primary duty when construing an unambiguous deed is to ascertain the intent of the parties from all of the language in the deed by a fundamental rule of construction known as the "four corners" rule. *See* ***Luckel***, 819 S.W.3d at 461. We discern the parties' intent from the entirety of the deed's language without reference to matters of mere form, relative position of descriptions, technicalities, or arbitrary rules. *See* ***Stribling v. Milligan DPC Partners, L.P.***, 458 S.W.3d 17, 20 (Tex. 2015). No single provision taken alone will be given controlling effect. ***SAS Inst., Inc. v. Breitenfeld***, 167 S.W.3d 840, 841 (Tex. 2005). We consider the entire writing and attempt to harmonize and give effect to all of its provisions by analyzing those provisions with reference to the document as a whole. *See* ***Frost Nat'l Bank v. L&F Distrib., Ltd.***, 165 S.W.3d 310, 312 (Tex. 2005). We must assume the parties to the instrument intended every clause to have some effect; therefore, the language of the deed should be interpreted so that no clause is rendered meaningless. ***Union Pac. R.R. Co. v. Amerton Prop., Inc.***, 448 S.W.3d 671, 678 (Tex. App.–Houston [1st Dist.] 2014, pet. denied). Lastly, we perform our review of an unambiguous instrument without considering parol evidence. *See* ***Stewman Ranch, Inc. v. Double M Ranch, Ltd.***, 192 S.W.3d 808, 810 (Tex. App.–Eastland 2006, pet. denied).

Characterization of the Mineral Interest

At trial, Penny contended that the subject property was J.O.'s separate property despite the fact that he was married to Pearl when he purchased the property from Polley. Property possessed by either spouse during or on dissolution of marriage is presumed to be community property. TEX. FAM. CODE ANN. § 3.003(a) (West 2006). To overcome this presumption, a party challenging the designation generally must trace and identify, by clear and convincing evidence, the property she claims is separate property. *See* ***Roberts v. Roberts***, 402 S.W.3d 833, 838 (Tex. App.–San Antonio 2013, no pet.).

In the instant case, Penny now concedes that there is no evidence in the record to rebut this presumption and no longer contests that the subject property described in the 1907 deed is the community property of J.O. and Pearl Payne. Thus, based on our review of the record and

Penny's concession, we conclude that at the time of Pearl's death in 1909, her children, Frances and James, Jr., inherited her undivided one-half community interest in the subject property.[7]

1931 Mineral Deed

The granting clause of the 1931 mineral deed specifically states that the grantors, J.O. and Gertrude, are conveying an undivided one-half mineral interest to James, Jr. and Frances. The next section of the deed sets forth the legal description of the subject property. The next two paragraphs track the typical language for that time period of a mineral deed subject to an existing lease. *See, e.g.,* Frank Elliott, *The Fractional Mineral Deed "Subject To" a Lease*, 36 TEX. L. REV. 620, 621 (May 1958). We note that in 1945, the Texas Supreme Court interpreted this "typical language" in a structurally similar mineral deed. *See* ***Richardson v. Hart***, 185 S.W.2d 563, 563–64 (Tex. 1945) (mineral deed described total mineral interest conveyed). Therefore, we apply ***Hart*** in construing these similar paragraphs in the 1931 mineral deed.

The first of these two paragraphs in the 1931 deed and the corresponding paragraph in the ***Hart*** deed describe the royalties to be paid under the terms of the oil and gas lease existing at the time of the conveyance. *See* ***id***. at 563. In this paragraph, the 1931 deed specifically references the oil and gas lease "executed in favor of the Sun Company." The deed further fixes the grantees' share of the royalty under the Sun lease at one-half, which is the fractional share of the minerals specified in the granting clause. Without this limitation in the 1931 deed, one-half of the royalties under the existing lease would have been paid to the grantees by operation of law. *See* ***id***. But, by including the limitation, the parties did not leave the payment of royalties and rentals to the operation of law. *See* ***id***.

The second of the two paragraphs in the 1931 deed and the corresponding paragraph in the ***Hart*** deed describe what happens when the oil and gas lease is either extended or terminated. *See* ***id***. In the 1931 deed, the grantors and grantees covenanted that the one-half mineral interest described in the deed as well as "all future rentals on said land," would be owned by the grantees. The fact that the deed fixes the grantees' share in the royalties or rentals the same as they would have received by operation of law does not lessen the force and effect of this conveyance. *See* ***id***.

It is apparent from a complete reading of the 1931 deed that it concerns the conveyance of only a one-half mineral interest in the described land. The deed explains what happens to this

[7] *See* n.2.

one-half mineral interest while the Sun Company lease is in effect as well as what happens when that lease expires.

Penny contends that after the 1931 deed was delivered to the grantees and filed of record, the grantors still owned a one-half mineral interest in the subject property while the grantees owned the other one-half of the minerals. Moreover, she argues that the purpose of the 1931 deed was simply to confirm the one-half mineral interest in the subject property that Frances and James, Jr. inherited upon their mother's death in 1909. We disagree.

Penny's interpretation of the deed would render its granting clause meaningless. *See* ***Frost Nat'l Bank***, 165 S.W.3d at 312 (appellate court required to give effect to all provisions of deed); ***Union Pac. R.R. Co.***, 448 S.W.3d at 678 (no provision of deed should be rendered meaningless). When we construe the deed so as to give effect to its granting clause in addition to its remaining clauses, the only reasonable interpretation of its language is that the remaining one-half mineral interest in the subject property was conveyed to Francis and James, Jr. Because Francis and James, Jr. already owned a one-half mineral interest in the subject property by virtue of their 1909 inheritance from Pearl, we hold that the terms of the 1931 deed resulted in their owning a one hundred percent mineral interest in the subject property. Consolidated's first issue is sustained.

ATTORNEY'S FEES

In its second issue, Consolidated requests that we render judgment that it is entitled to recover attorney's fees and remand the cause to the trial court for the consideration of the amount of attorney's fees.

Under the Uniform Declaratory Judgments Act, a trial court has discretion to award reasonable and necessary attorney's fees as are equitable and just. TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 (West 2015); ***Kachina Pipeline Co., Inc. v. Lillis***, 471 S.W.3d 445, 455 (Tex. 2015). Further, the trial court may award attorney's fees even to a nonprevailing party. *See* ***Scottsdale Ins. v. Travis***, 68 S.W.3d 72, 77 (Tex. App.–Dallas 2001, pet. denied); ***Templeton v. Dreiss***, 961 S.W.2d 645, 671 (Tex. App.–San Antonio 1998, pet. denied).

Here, Consolidated argues that because the trial court found against it on the merits, it never reached the issue of whether it should be awarded attorney's fees. However, the record indicates that Consolidated requested attorney's fees in its opening statement and submitted an

attorney's fees affidavit as a trial exhibit. There is no indication in the record that the trial court declined to consider the issue simply because it determined that Consolidated should not prevail.

Nonetheless, as a result of our disposition on the merits of this appeal, we may remand the issue of attorney's fees for reconsideration. *Cf.* ***Sava Gumarska in Kemijska Industria D.D. v. Advanced Polymer Sciences, Inc.***, 128 S.W.3d 304, 324 (Tex. App.–Dallas 2004, no pet.). Therefore, because an award of attorney's fees under the declaratory judgment statutes is a matter within the trial court's discretion, whether the trial court wishes to reconsider its decision on attorney's fees is a matter that we defer to the trial court. ***Id.*** Consolidated's second issue is sustained in part and overruled in part.

DISPOSITION

Because we have sustained Consolidated's first issue, we ***reverse*** the trial court's judgment and ***render*** judgment declaring that (1) Frances Payne Casey and James O. Casey, Jr. inherited Pearl Payne's one-half community interest in the subject property and (2) the effect of the March 12, 1931 deed from J.O. Payne and wife, Gertrude Payne, as grantors, to Frances Payne Casey and James O. Casey, Jr., as grantees, recorded in Volume 34, Page 613 of the Deed Records of Sabine County, Texas, was to vest the remaining one-half mineral interest described in said deed to the grantees and that the grantors retained no mineral interest in said real property. Because we have sustained Consolidated's second issue in part, we ***remand*** this cause to the trial court for further proceedings consistent with this opinion concerning whether Consolidated is entitled to attorney's fees.

JAMES T. WORTHEN
Chief Justice

Opinion delivered February 29, 2016.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

FEBRUARY 29, 2016

NO. 12-15-00105-CV

CONSOLIDATED PROPERTY INTERESTS, LLC,
Appellant
V.
PENNY PAYNE,
Appellee

Appeal from the 273rd District Court
of Sabine County, Texas (Tr.Ct.No. 12,827)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below is **reversed** and judgment **rendered** declaring that (1) Frances Payne Casey and James O. Casey, Jr. inherited Pearl Payne's one-half community interest in the subject property and (2) the effect of the March 12, 1931 deed from J.O. Payne and wife, Gertrude Payne, as grantors, to Frances Payne Casey and James O. Casey, Jr., as grantees, recorded in Volume 34, Page 613 of the Deed Records of Sabine County, Texas, was to vest the remaining one-half mineral interest described in said deed to the grantees and that the grantors retained no mineral interest in said real property; and the cause is **remanded** to the trial court for further proceedings consistent with this opinion concerning whether Consolidated is entitled to attorney's fees; and

that all costs of this appeal are hereby adjudged against the Appellee, **PENNY PAYNE,** for which execution may issue, and that the decision be certified to the court below for observance.

James T. Worthen, Chief Justice

Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.